UNITED STATES

THE CITY OF

THE

THE LOUISIANA

PAUL

Brief for the City of

on the motion

on the brief

Of Counsel

UNITED STATES SUPREME COURT.

No. 753.

THE CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

vs.

THE LOUISIANA CONSTRUCTION COMPANY, (LIMITED).

Brief for the City of New Orleans.

STATEMENT OF THE PLEADINGS AND FACTS.

The City of New Orleans filed an opposition in the United States Circuit Court to set aside the seizure under execution issued in the suit of the Louisiana Construction Company vs. the City of New Orleans. The seizure was of certain spaces of ground forming part of the public levee, the Sugar sheds extending over them and the reversionary rights of the City in the sheds. The third opposition is the legal remedy prescribed by the laws of Louisiana to set aside and annull the seizure under execution of property not liable to seizure; the seizing creditor and the Marshal are

sheds were erected in 1869, and the sheds and spaces, have ever since been used as provided in the ordinances and lease. See plans of the City, 1728, 1812, and others brought up with the bills, but it suffices to state in these plans the spaces between the front row of houses and the river is depicted as the *quai* or levee. The prominent question being; whether by the erection of these sheds under the authority of the common Council, "to afford shelter to the sugar and molasses received at this port," the levee of the City has been changed in its character from *locus publicus* to private property, so as to make it subject to seizure and sale for debt, it has been deemed proper to print the ordinances and lease in the appendix. See Lease and Ordinances, Record, pp. 39 to 47 printed also in appendix at the end of this brief.

Printed Record pp. 34, 35

On the trial of the opposition, the bill of exception recites, that the seizure and sale under execution of the ground, sheds and reversionary right of the City, being shown; the character of the ground as *locus publicus* dedicated to the public and in public use as the Sugar Landing at and long prior to the seizure and sale being also established; there being in evidence the ordinances and lease of the City of New Orleans of this Sugar Landing to J. B. Fleitas or assigns for twenty-five years, the ordinances and lease being passed "to afford shelter

to the sugar and molasses received at the port of New Orleans," and to this end the lease providing for the erection of the Sugar Sheds upon the leased ground or landing, the lessees to have the right to exact shelter charges on all sugar and molasses received under the sheds, the City to receive ten per cent. of these charges as a consideration for the lease, and the sheds to revert to the City at the end of the lease; it being proved also that the sheds were erected in 1869, and since have been used as provided in the ordinance and lease, and were in such use when seized and sold, and all other evidence being offered requisite to sustain the allegations in the opposition of the City and pertinent to the issues raised by the opposition, thereupon the Council for the City of New Orleans requested the Court to charge the jury upon the issues of law; and the Court was asked to instruct the jury to the effect stated in the three following distinct and separate propositions.

That the character of *locus publicus* impressed upon ground within the City of New Orleans devoted to public use cannot be changed except by an act of the Legislature of the State authorizing said change, and hence that the City of New Orleans, without such legislative authority, had no power to change the character of a *locus publicus*, and thereby make said *locus publicus* subject to seizure and sale on execution for the debts of the city.

Printed Record pp. 25, 26

That if the jury find from the evidence that the four squares or spaces of ground involved in this controversy, seized and sold to Isidore Newman by the United States Marshal, under the execution in the suit of the Louisiana Construction Company vs. the City of New Orleans, was *locus publicus* as a portion of the public levee of this City, dedicated to the common use of the inhabitants to serve the public purposes of a levee and landing place for the sugar and molasses brought to this port by steamboats and other vessels navigating the Mississippi river; and if the jury further find that in 1869 the City of New Orleans leased said spaces for the term of twenty five years under the ordinance of the City Council and the contract with the lessees that they should erect over said spaces sugar sheds for the accommodation and protection of the aforesaid sugar and molasses landed from said steamboats and other vessels, the lessees to have the right to collect dues upon the sugar and molasses deposited under said sheds for and in consideration of the accommodation and protection afforded by said sheds to said sugar and molasses, the city to be paid a percentage of said dues annually, and the sheds to revert and belong to said city at the end of said lease, as appears by said ordinances and contract made part of this bill; and if the jury find that said sheds were so constructed, and at and before the date of said adjudication and ever since the year 1869, the said spaces of ground and sheds were used for said purposes and for no other purposes; then the jury are instructed that the erection of said sheds upon and the use of said spaces as provided by said contract and ordinances, did not change the character of said spaces as part of the public levee or *locus publicus*, and make said spaces and sheds over them liable to seizure and sale on execution for the debts of the city, and any such seizure and adjudication was illegal and passed no title to the purchaser.

Printed Record pp. 29, 30

That if the jury find from the evidence that the four squares or spaces of ground involved in this controversy, seized and adjudicated to Isidore Newman by the United States Marshal, under the execution in the suit of the Louisiana Construction Company vs. the City of New Orleans, was *locus publicus* as a portion of the public levee of this city, dedicated to the common use of the inhabitants of the City, to serve the public purposes of a levee and landing place for the sugar and molasses brought to this port by steamboats and other vessels navigating the Mississippi river; and if the jury further find that in 1869, the City of New Orleans leased said spaces for the term of twenty-five years, under ordinances of the City Council and the contract with the lessees that they should erect over said spaces sugar sheds for the accommodation and protection of the aforesaid sugar and molasses landed from said steamboats and other vessels, the lessee to have the right to collect charges upon the sugar and molasses deposited under said sheds, for and in consideration of the accommodation and protection afforded by said sheds to said sugar and molasses, the city to be paid a percentage of said dues annually, and the sheds to revert and belong to said city at the end of said lease, as appears by the said ordinances and contract, a copy of which is herewith filed and made part of this bill; and if the jury find that said sheds were so constructed, and at and before the date of said adjudication, ever since the year 1869, the said spaces of ground and sheds were used for said purposes, and for no other purposes; then the jury are instructed that the aforesaid right of reversion of the said city to said sheds erected over said *locus publicus* was not liable to be seized and sold on execution for the debts of the city, and the seizure and adjudication of said reversion was illegal and passed no title to the purchaser.

Printed Record p. 32

Each of these propositions separately asked to be given to the jury, were each refused by the

Court, and to each refusal, exception was taken as stated in the bill. Instead of charging these propositions the Court charged as follows:

Printed Record pp. 26, 27

The jury are instructed as matters of law:

"1st. The spaces upon which the sugar sheds the reversion of the title to which has been seized under a writ of *fieri facias* in this case, was prior to August 14th, 1869, upon the undisputed facts established a *locus publicus*:

"2nd. That by the undisputed evidence it is established that said space was a portion of what is called the "batture," which is alluvial land between that portion of the City of New Orleans and the Mississippi River, and was a *locus publicus* at the time when Louisiana was acquired by the United States."

"There is no doubt of the correctness of the general proposition, that a public place is inalienable except by the sovereign, but a public place which is a portion of the batture according to the well settled jurisprudence of this State, has a distinctive quality impressed upon it, and may be withdrawn from the use of the public by the City. This qualification is seen to be a public necessity when we consider that by the action of the vast stream which half encircles the City the levees may be so wid ened as that unless a portion of them were used for buildings, and the inhabited City extended over them, the City itself would possibly be left at an inconvenient distance from the river. Accordingly we find, both in the decisions of the highest tribunal of the State, and in the act of the Legislature, a clear recognition of the authority of the City to withdraw from the public use any portion of the batture which it may deem no longer necessary to be held for that purpose."

"Therefore the Court instructs you that it was lawful for the City of New Orleans to withdraw the said space from the public and to make it private property, while it was a *locus*

publicus. The fee was in the City and the use was in the public, and the question of fact for you to decide is whether the City did not by the contract or lease of the date of August 14th, 1869, withdraw said space from the public use as being no longer necessary for the public."

"It is to be observed that the said contract gives to the grantee or lessee the "excusive right of using the public spaces" and gives to him "undisturbed possession of said public spaces and the sheds thereon erected," said sheds are to be for the purpose of storing sugar and molasses; there is no condition or requirement in said grant or lease which requires the said grantee or lessee to receive up to the capacity of the sheds the sugar and molasses of any person offering or which prevents him from any degree of discrimination, *i. e.*, he may store the products of one man and refuse those of another, although his store is not full."

"The contract reserves a royalty as a rent."

"The possession thus granted is to continue for the period of twenty-five years."

"The contract protected the public by the provision that 'the sheds should not be located more than one hundred and fifty feet to the present wooden work or wharves.'"

"If you find this contract was executed by the City of New Orleans and was accepted by the grantee or lessee and that he went into possession at the time of its execution and ever since remained under it in possession, and there is no dispute about these facts, then the Court instructs you there has been such a change in the destination of the property in question, such a withdrawal of it from the public as makes it properly held by the City for its own use and not that of the public, and makes its reversion liable to seizure on the part of a creditor of the City of New Orleans and your verdict would be for the plaintiff in the writ and against the Intervenor and third opponent."

The Counsel for the City in excepting to the refusal to charge each of the propositions requested, excepted also to that portion of the charge as given, enclosed in the side lines.

The Court in signing the bill of exceptions, added the following:

The Judge in allowing this bill of exceptions stated:

Printed Record pp. 29, 31 and 33.

The question at issue, as appears by the pleadings, was, whether the space occupied by the sugar sheds and the right to it, subject to the lease specified in the instructions given by the Court to the jury, were liable to seizure and sale under a writ of *fieri facias* sued out by a judgment creditor of the City of New Orleans.

The testimony given at the trial is correctly stated in this bill.

The counsel for the Intervenor and third opponent asked the Court to give the instructions presented in the requests, as stated in the bill. The Court refused these instructions in the manner and form as requested except so far as embodied in those which were given as stated in the bill.

A bill of exceptions were taken to those given, and to the two propositions contained in the instruction given as hereinafter stated.

The questions presented by the exceptions are two:

1st. Has the City of New Orleans the power, lawfully, to withdraw any portion of the *batture* from public use, change its destination, and make it private property?

2nd. If yes, did the City exercise this power and make the space in question private property, by the execution of the lease for twenty-five years and the grant of possession under it?

Both these questions the Court, in its instructions, answered in the affirmative, and the bills of exception presents these two propositions so given as instructions to the jury.

And since the matters herein stated do not appear by record this bill is allowed and signed.

EDWARD C. BILLINGS, Judge.

The instructions asked by the counsel for the City, being refused, the case went to the jury upon the charge of the Court and the result was a verdict and judgment dismissing the opposition of the City and maintaining the seizure and sale of the property in controversy. See judgment, Record pp.

Then followed the writ of error by the City of New Orleans.

ASSIGNMENT OF ERRORS.

1st. The Court erred in refusing to instruct the jury as requested by the counsel for the plaintiff in error, the City New Orleans.

That the character of the *locus publicus* impressed upon ground within the City of New Orleans, devoted to public use cannot be changed except by an act of the Legislature of the State authorizing said change, and hence that the City of New Orleans, without such legislative authority, had no power to change the character of *locus publicus*, and thereby make it subject to seizure and sale on execution for the debts of the City.

The error in this respect being that the instruction requested and refused, affirmed a correct legal proposition pertinent to the issue before the jury, of the power of the City with respect to places dedicated to the public and in public use; and the refusal by implication erroneously instructed the jury that the City could of its own power and without legislative authority, *i. e.*, from the State, change *locus publicus* to private property, liable to

be seized and sold under execution for the debts of the City.

2nd. The Court erred in refusing to instruct the jury as requested by the counsel for the plantiff in error, the City of New Orleans.

That if they find from the evidence that the four squares or spaces of ground involved in this controversy, seized and sold to Isidore Newman by the United States Marshal, under the execution in the suit of the Louisiana Construction Company vs. the City of New Orleans, was *locus publicus* as a portion of the public levee of this City, dedicated to the common use of the inhabitants to serve the public purposes of a levee and landing place for the sugar and molasses brought to this port by steamboats and other vessels navigating the Mississippi river; and if the jury further find that in 1869 the City of New Orleans leased said spaces for the term of twenty five years under the ordinance of the City Council and the contract with the lessees that they should erect over said spaces sugar sheds for the accommodation and protection of the aforesaid sugar and molasses landed from said steamboats and other vessels, the lessees to have the right to collect charges upon the sugar and molasses deposited under said sheds for and in consideration of the accommodation and protection afforded by said sheds to said sugar and molasses, the city to be paid a percentage of said dues annually, and the sheds to revert and belong to said city at the end of said lease, as appears by said ordinances and contract made part of the bill; and if the jury find that said sheds were so constructed, and at and before the date of said adjudication and ever since the year 1869, the said spaces of ground and sheds were used for said purposes and for no other purposes; then the jury are instructed that the erection of said sheds upon and the use of said spaces as provided by said contract and

ordinances, did not change the character of said spaces as part of the public levee or *locus publicus*, and make said spaces and sheds over them liable to seizure and sale on execution for the debts of the city, and any such seizure and adjudication was illegal and passed no title to the purchaser.

The error in this respect being, that the instruction requested and refused, stated a correct legal proposition pertinent to the issue in reference to the effect of the erection under the authority of the Common Council of sheds upon the levee or landing to afford necessary facilities for the commerce of the port, provided by the ordinances of the Council and lease; and the refusal to give the instructions was equivalent to charging the jury, that the ordinance and lease of the sugar landing to secure sheds to shelter from the weather, products landed on the levee, transformed the public levee dedicated to the public and in actual public use before and after the erection of the sheds,into private property and subjected the public levee to seizure and sale.

3rd. That the Court erred in refusing to instruct the jury.

That if they find from the evidence that the four squares or spaces of ground involved in this controversy, seized and adjudicated to Isidore Newman by the United States Marshal, under the execution in the suit of the Louisiana Construction Company vs. the City of New Orleans, was *locus publicus* as a

portion of the public levee of this city, dedicated to the common use of the inhabitants of the City, to serve the public purposes of a levee and landing place for the sugar and molasses brought to this port by steamboats and other vessels navigating the Mississippi river; and if the jury further find that in 1869, the City of New Orleans leased said spaces for the term of twenty-five years, under ordinances of the City Council and the contract with the lessees that they should erect over said spaces sugar sheds for the accommodation and protection of the aforesaid sugar and molasses landed from said steamboats and other vessels, the lessee to have the right to collect charges upon the sugar and molasses deposited under said sheds, for and in consideration of the accommodation and protection afforded by said sheds to said sugar and molasses, the city to be paid a percentage of said dues annually, and the sheds to revert and belong to said city at the end of said lease, as appears by the said ordinances and contract, a copy of which is herewith filed and made part of this bill; and if the jury find that said sheds were so constructed, and at and before the date of said adjudication, ever since the year 1869, the said spaces of ground and sheds were used for said purposes, and for no other purposes; then the jury are instructed that the aforesaid right of reversion of the said city to said sheds erected over said *locus publicus* was not liable to be seized and sold on execution for the debts of the city, and the seizure and adjudication of said right of reversion was illegal and passed no title to the purchaser.

The error being that the instruction requested and refused, stated correctly the legal proposition before the jury in regard to the immunity from seizure of the reversionary right of the city, at the end of the lease, to the sheds erected by permission of the City upon the levee, and the refusal to in-

struct, in effect, told the jury that the erection of the sheds on the levee for public purposes under the ordinance and lease of the City, made these sheds standing on the public levee for the uses of commerce, and the right of the city thereto, private property, so as to subject the sheds and reversionary right of the city to seizure and sale for the debts of the city.

4th. That the Court erred in charging the jury that it was lawful for the City to withdraw the space of ground in controversy from public use, and make it private property, while it was a *locus publicus*, when in fact the city has no such right, nor is there any such sanction in the decisions of the Louisiana courts or in the legislation of the State.

5th. The City has no title to a public place, but only the right of administration for the public use, of the ground in controversy, a portion of the public levee, and it was error for the Court to charge the jury that the fee [redacted] was in the City, although qualified by the charge that the use was in the public.

6th. The Court erred in its construction of the lease exhibited by the portions of the charge, to-wit: "That it gave the grantee or lessee the exclusive right and undisturbed permission of the spaces and sheds," although accompanied with the qualification, "for the purpose of storing sugar and molasses;" "that there was no requirement or condition requiring the lessee to receive up to the capacity of the sheds the sugar and molasses of any person offering or which prevents any discrimination—*i. e.*, he may store the products of one and refuse those of

another;" "that the contract reserves a royalty as a rent;" "that the permission thus granted is to continue twenty-five years;" "that the contract protected the City by the provision that the sheds should not be located nearer than one hundred and fifty feet from the present wooden work or wharves;" all these portions of charges presented the lease to the jury as a grant or absolute conveyance by which the City had granted the levee for private purposes and thereby made the public levee of New Orleans private property, when in fact the City had merely leased for a term the sugar landing to secure the erection of sheds thereon in aid of the municipal purpose "to afford shelter to the sugar and molasses received at this port;" all the stipulations in the lease with reference to the shelter charges to be paid on the sugar and molasses, the proportion thereof to accrue to the City, and other stipulations being incidental to the municipal purpose proposed by the ordinance and lease; these portions of the charge being erroneous and misleading in not exhibiting the real character of the lease and in presenting it to the jury as an alienation and conversion of the public levee into private property.

7th. The Court erred in instructing that the execution of the contract, its acceptance by the lessee and possession under it by the lessee changed, the destination of the property was a withdrawal from public use, made it private property held by the City for its own use, not that of the public, and made its *reversion* liable to seizure on the part of the creditors of the City, when in fact the lease of the public levee to secure sheds for the public purposes to which the levee is devoted, constitutes no change in the destination of the levee, nor a withdrawal of it from public use, or warrants in any manner or in any degree the conclusions in that regard announced in the charge and which the jury followed to the prejudice of the plaintiff in error.

8th. That the Court erred in charging the jury that the execution of the contract by the grantee or lessee, his entering into possession at the time of its execution and since remaining in possession under the contract, changed the destination of property—*i. e.*, the spaces of ground in controversy—was such a withdrawal of it from public use, as makes it property held by the City for its own use and not of the public, and makes the property liable to seizure for the debts of the City, the error consisting in this that the ground on which the sheds were erected being *locus publicus*, the sheds erected thereon for public purposes impressed with the same character, it follows that the lease, the acceptance of it, and possession by the lessee, did not, as erroneously charged by the City, withdraw the ground from public use and make it private property.

9th. The Court erred in charging that the decisions of the highest tribunal of the State and in the act of the Legislature, there was a clear recognition of the authority of the City to withdraw from public use the batture it deems no longer requisite to be held for the public use. The error being that there is no such legislative act, and no recognition of such asserted authority of the City.

ARGUMENT.

The space of ground between the front row of houses of the City of New Orleans and the Mississippi River, was dedicated to public use as the *quai* or levee, at and before the cession of Louisiana to the United States. The batture or alluvion formed by the river. has added to the space, but its character derived from the original dedication is

preserved. 10th Peter's Report pp. 662, 717, 718, 735, 736. The ground in controversy is within this space. The character of this ground between the front row of houses and the Mississippi River has been the subject of judicial examination in this Court, as well as in the Courts of the State. The decisions both of this Court and of the State, have recognized and firmly established that the ground was *locus publicus*. Civil Code, articles 449, 450, 454, 458. See De Armas vs. New Orleans, 5th Louisiana Reports, pp. 132, 174, 185; Municipalty vs. Hopkins, 13th Louisiana Reports, pp. 328, 331. The United States vs. New Orleans, 10th Peter's Reports, p. 710, 717, 718.

There is no question that the ground in controversy was a public place, and in public use as the levee or landing for the products brought to New Orleans by steamboats and other vessels. The bill of exceptions and the plans of the City from 1728 show that the ground was *locus publicus* and the charge concedes that character to the ground down to 1869. At that date, the charge assumes that the ground was withdrawn from public use and became private property. This asserted withdrawal of the ground from the public, is the main issue in the case. Charge and the bill of exceptions, Record pp. 26, 27, 25 to 34.

Plans Printed Record pp. 34, 35

The Counsel for the City requested the Court to

charge that the City without authority from the State, could not change the character a public place. This charge the Court refused, to which refusal exception was taken. The Court on the contrary, charged that it was lawful for the City to withdraw property from public use, the Court stating there was a clear recognition of the right of the City to withdraw the batture, in the jurisprudence and legislative act of the State, and to this charge the City excepted. This refusal to charge and the charge as given, are assigned in the 1st, 4th and 9th assignments of error and as involving the same question will be considered together.

It is true, there is a statute of the State which authorizes the riparian proprietor to sue the corporation for the batture in front of his property, whenever the batture formed is more than necessary for the public use. Revised Statutes of Louisiana, S. 318. If the City of New Orleans were the riparian proprietor of the public levee of the old City proper, then if it had been withdrawn from public use the ground on which the Sugar Sheds rests, it might be deemed that the withdrawal made the ground private property, as the City could not sue itself. The statute, however, has no application whatever, because the City is not the proprietor of any part of the levee or space on which, or the batture in front of it, the sugar sheds stand. The de-

dication of the whole of the space to the public use and the exclusion of the City from any title to any part of the space, is firmly established, as shown by the decisions of this Court and of the Supreme Court of the State, already cited, and especially by the emphatic language in 5th Louisiana, p. 174.

Again the present City charter (that of 1882 contains a provision authorizing the City to lay off and sell in lots or squares, from time to time, so much of the batture as may not be requisite for the public use. If the City in 1882, or since had sold the ground on which the sugar sheds are placed, the legislative act could probably have been invoked as the requisite authority from the sovereign But the City has never sold the ground on which the sugar sheds stand. It would be confusing language to speak of the erection of sheds on the public levee to shelter produce landed from steamboats, as a sale of the levee itself. This provision was inserted in the City Charter for the first time in 1882, and has no earthly application to this controversy for the obvious reasons that the statute was not in existence when the lease of the ground in controversy was made, and next because the city has sold no batture. See City Charter Acts of 1882, p. 21, S. 8. This provision of the City Charter of 1882, is simply confirmatory of the instruction asked by the City and refused; that without legislative authority

the City could not make private property of the levee or batture dedicated to public use.

The City of New Orleans is a political corporation, the creature of the Legislature. It can exercise no power not conferred by its charter or the general law of the State. Of public things, that is the streets, the public squares, the levees and other public places dedicated to public use, the City has only the right of administration to secure the public uses to which these *loci publici* are devoted. Thus, the city charter in force, when these sugar sheds were erected conferred upon the City the power to regulate and make improvements to streets, public squares, wharves and other public property, and all other power with respect to such places was withheld. The absence of any power of alienation of the city over public places, has received a striking illustration in the cases that have already arisen in regard to this very ground between the houses and the river. The City undertook to sell some property within this space. Thereupon, a contest arose as to the title to the ground, and that contest provoked the decision of this Court already cited from 10th Peters and also decisions of the Supreme Court of the State. All the decisions recognized that the ground was *locus publicus* by reason of the dedication at and prior to the time of the cession. Pending the contest, the Legislature of Louisiana

ratified the sales. It was held by the Supreme Court of Louisiana, that the destination of the ground as a public place was made by the sovereign power, and the right to change this destination whenever the public interest requires, is vested in the same power, hence, the Court held that the disposition of the proceeds of the sales, by an act of the Legislature, was equivalent to an original authority on the part of the State or sovereign to make the alienation. See 13th La. Reports, p. 328. This decision and a line of others with reference to the space involved in this controversy have firmly established that the sovereign—*i. e.*, the State—alone can change the character of a public place, affirmed in the instruction asked by the City and refused by the Court, and that the City, without legislative authority, could not withdraw from public use and make private property the ground on which these sheds rest. See Civil Code of Louisiana of 1870, Articles 449, 450, 453, 454, 555, 458; City Charter of 1870; Extra Session, Acts, pages 30, 35; S. 12, par. No. 2; DeArmas vs. New Orleans, 5th Louisiana Reports, page 32; New Orleans vs. Hopkins, 13th Louisiana Reports, page 328; Shepherd vs. Munipality No. 3, 6th Robinson's Louisiana Reports, page 349, DeLabigarre vs. Municipality No. 2, 3rd Louisiana Annual Reports, page 230; Parish vs. Municipality No. 2, 8th Louisiana Annual Reports,

page 149; United States vs. New Orleans, 10th Peters Reports, pages 662, 710 et seq.

It results, therefore, that the instruction asked by the City and refused by the Court that the City, without legislative authority could not make private property, the public levee, dedicated to public use, was entirely correct; should have been given to the jury; that the court erred in refusing the instruction, and in instructing on the contrary, that it was lawful for the City to withdraw the ground in controversy and that the legislative act and the jurisprudence of the State recognized the right of the City to withdraw batture, and it follows that the first, fourth and ninth assignments of error on this subject must be maintained

The second assignment of error is to the refusal of the Court to charge that the erection of the sheds for the purposes disclosed by the ordinance and lease, did not change the character of the spaces of ground in controversy as *locus publicus*, and make said spaces liable to seizure and sale for debt.

The eighth assignment relates to the charge of the Court that negatived the instruction asked, and affirmed that the sheds had became private property.

The sixth assignment is, those portions of the charge which particularize the parts of the lease that in the view of the Court sustained the conclu-

sion announced to the jury, that the lease and its execution changed the levee from *locus publicus* to private property.

The third assignment is, the refusal of the Court to charge that the reversionary right of the City to sheds at the end of the lease, like the levee itself, on which the sheds were placed, was not subject to seizure.

The seventh assignment is, the instruction that the reversion could be seized. If the levee itself, on which the sheds were placed for the public purposes was *locus publicus* to shelter goods landed on the levee, it would seem to follow the sheds were also exempt. The charge subjected to seizure the levee, the sheds, and reversion. Hence, the proposition that the erection of these sheds, under the ordinance and lease, did not change the destination of the levee, or subject the levee or sheds to seizure, is the basis of the 2d, 3d, 6th, 7th and 8th assignments, will be considered together.

It is submitted the City could not withdraw the levee from public use. The proposition has been discussed in considering the first, fourth and ninth assignments of error. But if the City had had the power, can it be maintained that the erection of these sheds on the levee under the authority of the Common Council to subserve the public pur-

poses disclosed by the ordinance and lease, produced the remarkable consequence of making private property, the *locus publicus* covered by the sheds. This result the charge given by the lower court affirms. That no such result was accomplished, is maintained by the instructions asked and refused by the court. The lease and ordinance are before this Court attached to the bill. The levee of New Orleans is used to received sugar, cotton, molasses and the products brought to the city by the commerce of the port. It is a municipal function to afford facilities so as to promote and invite this commerce. To put sheds on the levee to protect merchandise is specifically mentioned as a municipal function in the present city charter. Acts of 1882, p. 21, section 8. This ordinance and lease, are to be viewed in connection with this function of the municipal government. The title of the ordinance is an apt statement of the purpose and whole purpose of the ordinance. The ordinance is entitled, to provide for the shelter and protection of sugar and molasses received at the port of New Orleans. Is it possible that there lurks under this title an alienation of the public levee, so ensential to the commerce of the city, and an actual conversion of the levee into private property, as is affirmed by the Circuit Court in the charges it gave, and with equal emphasis by implication in the charges re-

Printed Record pp. 39 to 47 and in appendix to this brief.

fused? Suppose the city had put up these sheds at the expense of the municipal *fisc*, would any one maintain that the City thereby alienated the levee and made it private property? Is it sensibly different, that under the ordinance the contractors or lessees were to put up the sheds for public purposes, for the consideration of exacting for a fixed period charges upon the sugar and molasses sheltered by the sheds, the sheds themselves to revert and belong to the city at the end of the lease. Conceding to the lessees the right to collect the charges for the term of the lease on the sugar and molasses, was only the mode by which the city secured sheds needed for the commerce of the port. Is it to be said that the mere putting up of sheds to subserve public uses made private property of the *locus publicus* on which the sheds were placed? Or is it the charges that the City authorized the lessees to collect on products landed on the public levee and sheltered under the sheds, that it is maintained have produced the effect of changing the character of the public levee of this City? The wharves that line our levee, like the sheds, are facilities to commerce. The wharves of our City are essentially public. All these wharves, as this Court has had occasion to know, are constructed by lessees who charge wharfage dues. 121 United States Reports, 444. If the pretension in this

case succeeds, it will next be contended that the public wharves of the city and the public levee on which they partly rest are private property, to be seized and sold for debts of the city. Surely, neither these sheds or the wharves or the levees on which they have been constructed, or the charges the lessees demand, can furnish any basis to maintain that the city of New Orleans has alienated the public levee, withdrawn it from the public, and effected the transformation of *locus publicus* into private property to be seized and sold for debt like any private estate.

The purpose of the shed ordinance manifestly, was not to make any conveyance of title. If the ordinance to provide for the sheltering of products on the public levee, was what the charge of the Circuit Court supposes, the community, it is perhaps allowable to say, were utterly unsuspicious and inattentive to so unusual an appropriation to private purposes of the public levee. No one would dream of any such purpose in perusing the ordinance contract. Any member of the City Council who voted for that ordinance, with its commonplace title, would have been utterly appalled by the announcement that he had voted to sell out or alienate the levee. There is no word or line in the ordinance or contract usually employed when a conveyance of title is intended. The levee is pub-

lic, and under the ordinance and contract the levee and sheds were to be used for the public purposes to which the levee was devoted. This was all the Council proposed. All that was accomplished. The sheds were to shelter the sugar and molasses landed on the levee, and to this end no conveyance of title to property was needed. It was the exclusive right and privilege of using "the spaces and sheds for the public purposes announced in the ordinance that was conferred upon the contractors or lessee who was to put up the sheds. There is no conveyance of title to the property expressed or implied. The object in view, was utterly inconsistent with any transfer of title, for even the right of use conferred on the contractor was to cease, and the sheds themselves to revert to the City when the lease ended. On any view of the purpose and language of the ordinance and lease, it must be deemed simply and utterly, incompatible with the intention, purpose and language employed, to hold up this ordinance and lease to put sheds on the public levee for public uses, and maintain that ordinance or lease, or both together withdrew the levee from the public or changed in any manner the destination of the levee and made it private property, as was maintained by the Circuit Court.

The fifth assignment of error was to the charge that the fee to the ground in controversy, was in the city, while the use was in the city. If the city was vested with the fee, the right of absolute disposition of the property was in the city. The fee was not in the city. The error on this subject in the charge, was in itself, enough to control the verdict and secure the reversal of the judgment.

The judgment in this case deprives the city of a large portion of the public levee. The conclusion of the Circuit Court, by which this result has been produced rest upon the effect given by that Court to the ordinance and lease to put sheds on the levee for the accommodation of commerce. It is believed the interpretation placed by the Circuit Court upon the shed ordinance and lease, can never receive the sanction of this court. It is submitted with equal confidence that the propositions of law announced in the charge of the Circuit Court, and set forth in the assignments of error cannot be supported.

The plaintiff in error respectfully submits the judgment should be reversed and rendered in favor of the city of New Orleans, or the case remanded for further proceedings, in accordance with the opinion of this court.

Respectfully submitted,

CARLETON HUNT,

HENRY C MILLER,

Of Counsel for the City of New Orleans.

APPENDIX.

Ordinances and Lease, made part of Bill of Exceptions.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *August* 14, 1869.

No. 1528, N. S.

An ordinance to provide for the shelter and protection of sugar and molasses received at the port of New Orleans.

SECTION 1. Be it ordained by the common council of the city of New Orleans, That Francis B. Fleitas shall have and enjoy for the period of twenty-five years the exclusive right and privilege of using the public spaces on the levee, in the second district of this city, between Customhouse and St. Louis streets, commonly known as the Sugar landing—said spaces being designated on a plan of the city surveyor, to be by him submitted to the committee on streets and landings on or before the 15th day of September, in the year 1869—for the purpose of erecting and constructing thereon fireproof sheds for the reception and shelter of sugar and molasses, according to the plans and specifications of the city surveyor on the day aforesaid, which sheds, with such arrangements for the transaction of business as may be convenient, are to be constructed on or before the 1st day of November,

1871, unless the construction be interfered with or prevented by extraordinary accident or calamity, from which time said privilege and right is to commence to run; Provided. That said Fleitas, immediately after the passage of this ordinance, shall have the right to enter upon and use the said spaces for the purposes of construction as aforesaid.

SEC. 2. Be it further ordained, That the terms and conditions on which said right and privilege are granted are the following:

1st. Said sheds are to be erected, with such accommodations and convenience for the transaction of business as may be necessary, by said Fleitas, at his own cost and free of expense to the city of New Orleans, and during the existence of said privilege he is to keep said sheds in good order and repair at his own expense.

2d. Said Fleitas is allowed to charge, during the term said privilege is to last, under the provision of this ordinance, a sum not exceeding twenty-five cents on every hogshead of sugar and fifteen cents on every barrel of molasses sheltered under said shed, and no other charge for shelter is to be made, unless the packages aforesaid, after being under cover, shall change hands; then he is allowed to charge each and every time such package changes hands while under cover fifteen cents for each hogshead of sugar and five cents for each barrel of

molasses at the time of transfer; Provided, That this last-mentioned charge is to be paid by each transferee or purchaser, and shall not be made when the sugar or molasses transferred or sold shall be removed by such transferee or purchaser on the same day he acquired title; Provided further, That sugar and molasses in other packages than hogsheads and barrels shall be subject to *pro rata* charges.

3rd. That said Fleitas shall pay to the city of New Orleans, as a consideration for said privilege, during the term aforesaid, ten per centum of the gross amount of charges realized for shelter on each hogshead of sugar and each barrel of molasses placed under said sheds, the said per cent. to be paid quarterly, on statements rendered under oath, to the treasurer of the city of New Orleans; Provided, That said sheds and the revenues or income derived therefrom or from said privilege shall not be subject to any municipal taxation whatever during the existence of said privilege.

4th. In addition to the above consideration, the said sheds, at the expiration of said term of twenty-five years, are to be appraised to their then cash value in the manner following: One appraiser to be appointed by the said Fleitas or his representatives, successors, or assigns, and the other by the city of New Orleans. In case of disagreement the

The reversionary right

two thus selected shall call in a third disinterested person as umpire, and the appraisement thus made shall be conclusive and binding on all parties, and the city of New Orleans shall have the option to take said sheds at one-half of said appraised value or of extending the privileges herein granted, on the same terms as those herein specified, for the further period of fifteen years, except that at the expiration of said fifteen years said sheds are to revert to the city in full ownership, free of all cost. In case the city of New Orleans, within three months after the expiration of said twenty-five years, shall fail or refuse to appoint an appraiser, it shall be considered as having exercised the option to extend the privilege aforesaid for fifteen years longer; and in case the said Fleitas, his representatives, successors, or assigns, shall, within one month after, the city shall have the right of appointing two additional appraisers, whose appraisement shall be final, and said Fleitas shall receive one-half of the appraised value of said sheds from the city. On the presentation of the decision of the appraisers provided for in this clause and on the payment of the said one-half of the said appraised value the sheds and spaces on which they are erected, as aforesaid, shall be surrendered and transferred to the city of New Orleans.

SEC. 3. Be it further ordained, That the city

of New Orleans hereby gnarantees to said Fleitas, his representatives, successors, or assigns, during the term of his privilege and its extension, the following:

1st. The undisturbed possession of said public spaces and the sheds thereon erected.

2d. That the present landing for sugar and molasses shall remain where it now is and as designated on the plans aforesaid.

3d. That no other landing for sugar and molassess shall be established or allowed for the city or port of New Orleans.

4th. That no other privilege for the reception and shelter for sugar or molasses shall be allowed by the city.

SEC. 4. Be it further ordained, That in case the sheds erected under the provisions of this ordinance should not be of sufficient capacity to meet the demands of increased production or the requirements of commerce the said Fleitas shall have the right to increase the number of sheds, said additional sheds to be erected on such spaces as the city may designate and on such terms as may be agreed on; Provided, That if said additional sheds are erected within ten years from the 1st November, 1871, the cost thereof is to be paid by the said Fleitas, his representatives, successors, or assigns, and said additional sheds are to revert to the city at the

expiration of twenty-five years from the date of construction on the same terms in regard to appraisement and the option to extend the privilege of using the same as if the said additional sheds were originally constructed under this ordinance, and all the terms and stipulations of this ordinance shall be considered applicable to them in the same manner and to the same extent as they are herein applied to the original sheds.

SEC. 5. Be it further ordained, That said Fleitas shall give security in the sum of fifty thousand dollars for the faithful performance of the stipulations herein contained.

SEC. 6. Be it further ordained, That the wharfinger shall have the right at any time when the leveee is encumbered to enforce the now existing regulations.

SEC. 7. Be it further ordained, That the sheds shall not be located nearer than one hundred and fifty feet to the present wooden work or wharves.

SEC. 8. Be it further ordained, That if at any time the city should desire to open or extend any street that the privilege hereby granted shall not in any manner prevent said street from being opened or extended.

SEC. 9. Be it further ordained, That all ordinances and parts of ordinances inconsistent or conflicting with the provisions of this ordinance be,

and the same are hereby, repealed, and this ordinance shall take effect from and after the date of its promulgation.

(S'g'd) G. PANDELLY,
President Board of Ass't Aldermen.

(S'g'd) LEWIS A. WILTZ,
President Board of Aldermen.

Approved August 14, 1869.

(S'g'd) JNO. R. CONWAY, *Mayor.*
JNO. W. OVERALL,
Secretary, Mayoralty.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *May* 8, 1878.

No. 4492, admi. series.

An ordinance amending ordinance No. 1528, new series, entitled "An ordinance to provide for the shelter and protection of sugar and molasses received at the port of New Orleans."

Whereas it has been found advisable, by and with the consent of the New Orleans Sugar Shed Company, to change the tariff under which they have been carrying on business by modifying the same as hereinbelow effected and fixing a permanent list of charges to which all persons using said sheds are to conform; Therefore—

SECTION 1. Be it ordained by the mayor and administrators of New Orleans, in council convened,

That the second paragraph of section two of ordinance No. 1528, new series, be amended and reenacted so as to read as follows: The New Orleans Sugar Shed Company, as transferee and successor of Francis B. Fleitas, shall be allowed to charge during the term the privilege granted by this ordinance shall last (under the provisions thereof) a sum not exceeding forty cents for every hogshead of sugar and fifteen cents for every barrel of molasses sheltered or stored under said sheds for each month or fraction of a month that it shall be sheltered or stored, and one charge not exceeding ten cents for each hogshead and five cents for each barrel for labor in receiving, assorting, storing, and delivering the same, and no other charge shall be made for shelter, storage, or labor, unless the packages aforesaid, after being under cover, shall change hand of owners, in which case said charges for shelter or storage as aforesaid shall, as to the transferee or purchaser, be computed from the day of sale or transfer; Provided, That no charge whatever shall be made against the transferee or purchaser when the sugar or molasses transferred or sold shall be removed by such transferee or purchaser on the same day he acquired title; Provided further, That sugar or molasses in other packages than hogsheads or barrels shall be subject to *pro rata* charges for shelter, storage and labor.

SEC. 2. Be it further ordained, etc., That the bonus of ten per cent, pursuant to paragraph 3d of said section second shall be paid on the gross receipts for shelter or storage in any manner obtained by said company,

SEC. 3. Be it further ordained, etc., That sugar and molasses landed at the places set apart for the Sugar Landing and not left thereon in contravention of city ordinances shall not be placed under the sugar sheds against the consent of the owners; but nothing contained herein shall be construed to affect paragraph two of section nine of said ordinance No. 1528, new series.

SEC. 4 Be it further ordained, etc , That the mayor of the city of New Orleans be, and he is hereby, authorized and directed to receive the assent of the said sugar shed company to the above modification of their charter or contract.

SEC. 5. Be it further ordained, etc., That all city laws and ordinances contrary to and in conflict herewith be, and the same are hereby, repealed, and that this ordinance shall go into effect from and after its passage.

Adopted by the council of the city of New Orleans, May 7, 1878.

Yeas—Brown, Cavanac, Denis, Diamond, Edwards, McCaffrey, Rengstorff.

(S'g'd) ED. PILSBURY, *Mayor.*

(S'g'd) THOS. G. RAPIER, *Secretary.*

Lease Marked F.

Contract with the city.

STATE OF LOUISIANA, *City of New Orleans.*.

Be it known that on this day, the eighteenth of the month of August, in the year of our Lord one thousand eight hundred and sixty-nine, and the ninety-fourth of the Independence of the United States, before me William Joseph Castell, a notary public in and for the parish of Orleans and official notary for the city of New Orleans, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned, personally appeared the Hon. John R. Conway, mayor of the city of New Orleans, herein acting in his said capacity, and Francis B. Fleitas, of the city of New Orleans, and the said mayor, acting as aforesaid, declared by virtue of the authority in him vested by an ordinance, No. 1528, N. S., passed by the common council of the city of New Orleans, entitled "An ordinance to provide for the shelter and protection of sugar and molasses received at the port of New Orleans," he does, by these presents, grant, bargain, and confirm unto said Francis B Fleitas and contract with him as follows:

That said Francis B. Fleitas shall have and enjoy for the period of twenty-five years the exclusive right and privilege of using the public spaces on the levee, in the second district of this

city, between Customhouse and St. Louis streets, commonly known as the Sugar landing—said spaces being designated on a plan of the city surveyor, to be by him submitted to the committee on streets and landings on or before the 15th day of September, in the year 1869—for the purpose of erecting and constructing thereon fire-proof sheds for the reception and shelter of sugar and molasses, according to the plans and specifications of the city surveyor on the day aforesaid, which sheds, with such arrangements for the transaction of business as may be convenient, are to be constructed on or before the first day of November, 1871, unless the construction be interfered with or prevented by extraordinary accident or calamity from which time said privilege and right is to commence to run; Provided, That said Fleitas, immediately after the passage of said ordinance, shall have the right to enter upon and use the said spaces for the purpose of construction aforesaid.

That the terms and condition on which said right and privilege are granted are as following:

1st. Said sheds are to be erected, with such accommodation and conveniences for the transaction of business as may be necessary, by said Fleitas at his own cost and free of expense to the city of New Orleans, and during the existence of said privilege he is to keep said sheds in good order and repair at his own expense.

2d. Said Fleitas is allowed to charge, during the term said privilege is to last under the provisions of said ordinance, a sum not exceeding twenty-five cents on every hogshead of sugar, and fifteen cents on every barrel of molasses sheltered under said sheds, and no other charge for shelter is to be made unless the packages aforesaid, after being under cover, shall change hands; then he is allowed to charge each and every time such package changes hands while under cover fifteen cents for each hogshead of sugar and five cents for each barrel of molasses at the time of transfer; Provided, That this last mentioned charge is to be paid by each transferee or purchaser, and shall not be made where the sugar or molasses transferred or sold shall be removed by such transferee or purchaser on the same day he acquired title; Provided, further, That the sugar and molasses in other packages than hogsheads and barrels shall be subject to *pro rata* charges.

3d. The said Fleitas shall pay to the city of New Orleans, as a consideration for said privilege during the term aforesaid, ten per centum of the gross amount of charges realized for shelter on each hogshead of sugar and each barrel of molasses placed under said sheds, the said per cent. to be paid quarterly on statements rendered under oath to the treasurer of the city of New Orleans; Pro-

vided, That said sheds and the revenues or income derived therefrom or from said privilege shall not be subject to any municipal taxation whatever during the existence of said privilege.

The reversion

4th. In addition to the above consideration, the said sheds, at the expiration of said term of twenty-five years, are to be appraised at their then cash value in the manner following: One appraiser to be appointed by the said Fleitas or his representatives, successors, or assigns, and the other by the city of New Orleans. In case of disagreement between the two thus elected—shall call in a third uninterested person as umpire, and the appraisement thus made shall be conclusive and binding on all parties, and the city of New Orleans shall have the option to take said sheds at one-half of said appraised value or of extending the privilege herein granted for the further period of fifteen years on the same terms as those herein specified, except that at the expiration of said fifteen years said sheds are to revert to the city in full ownership, free of all cost. In case the city of New Orleans, within three months after the expiration of said twenty-five years, shall fail or refuse to appoint an appraiser, it shall be considered as having exercised the option to extend the privilege aforesaid for fifteen years longer, and in case the said Fleitas his representatives, successors, or assigns, shall,

within one month after the city shall have appointed its appraiser, fail or refuse to appoint an appraiser on his behalf, the city of New Orleans shall have the right of appointing two additional appraisers, whose appraisement shall be final, and said Fleitas shall receive one-half of the appraised value of said sheds from the city. On the presentation of the decision of the appraisers provided for in this clause and on the payment of the one-half of the said appraised value the sheds and spaces on which they are erected as aforesaid shall be surrendered and transferred to the city of New Orleans.

That the city of New Orleans hereby guarantees to said Fleitas, his representatives, successors, or assigns, during the term of this privilege and its extension the following:

1st. The undisturbed possession of said public spaces and the sheds thereon erected.

2d. That the present landing for sugar and molasses shall remain where it now is and as designated on the plan aforesaid.

3d. That no other landing for sugar or molasses shall be established or allowed for the city or port of New Orleans.

4th. That no other privilege for the reception and shelter of sugar or molasses shall be granted by the city.

That in case the sheds erected under the provisions of said ordinances shall not be of sufficient capacity to meet the demands of increased production or the requirements of commerce the said Fleitas shall have the right to increase the number of sheds, said additional sheds to be erected on such spaces as the city may designate and on such terms as may be agreed on; Provided, That if said additional sheds are erected within ten years from the first of November, 1871, the cost thereof to be paid by said Fleitas, his representatives, successors, or assigns, and said additional sheds are to revert to the city at the expiration of twenty-five years from the date of construction on the same terms in regard to appraisement and the option to extend the privilege of using the same as if the said additional sheds were originally constructed under the said ordinance, and all the terms and stipulations of said ordinance shall be considered applicable to them in the same manner and to the same extent as they are herein applied to the original sheds.

That said Fleitas shall give security in the sum of fifty thousand dollars for the faithful performance of the stipulations herein contained.

That the wharfingers shall have the right, at any time when the levee is encumbered, to enforce the now existing regulations.

That the sheds shall not be located nearer

than one hundred and fifty feet to the present wooden work or wharves.

That if at any time the city should desire to open or extend any street that the privilege hereby granted shall not in any manner prevent said street from being opened or extended.

The said Fleitas, hereby binding himself, his heirs, executors, or assigns, to execute the above and foregoing contract in accordance with the said ordinance No. 1528, N. S., and in accordance with the plans and specifications to be hereafter prepared by the city surveyor as aforesaid, binding himself in all respects to comply with all the stipulations contained in said ordinance, a duly certified copy of which ordinance, which was approved on the 14th of August, 1869, is and remains hereto annexed for all future reference and is made part hereof.

And now personally came and appeared Samuel Jamison, James J. Warren, Francis H. Hatch, and Samuel E. Moore, all of the city of New Orleans, who, having read what is above written, declare that they hereby guarantee to the city of New Orleans the faithful performance of the foregoing contract by the said Francis B. Fleitas, and bind themselves, their heirs, executors, or assigns, *in solido*, in favor of the said city of New Orleans, in the sum of fifty thousand dollars, in lawful money of the United States of America, payable on demand to the city of New Orleans.

Now, the condition of the above-written bond or obligation is such that if the said Francis B. Fleitas shall well, truly, and faithfully perform and execute the present contract in accordance with the said ordinance, etc., as aforesaid, then the above written bond and obligation to be null and void, but otherwise to be and remain in full force and virtue. The said S. Jamison, J. J. Warren, F. H. Hatch, and Sam'l E. Moore hereby waive the benefit of division and discussion granted by law to sureties.

United States internal revenue stamps amounting to one dollar and fifteen cents are affixed hereto, duly cancelled at the execution thereof.

Thus done and passed in my office, at the city of New Orleans aforesaid, the day, month, and year first above written, in presence of Lawrence McCormick and Michael L. Luther, competent witnesses, domiciliated in this city, who hereunto sign their names with said parties and me, said notary, after the reading of these presents.

(Signed) JOHN R. CONWAY, *Mayor.*
F. B. FLEITAS,
SAM'L E. MOORE,
F. H. HATCH,
J. J. WARREN,
SAM'L JAMISON,
W. J. CASTELL,
Notary Public.

SUPREME COURT OF THE UNITED STATES.

No. 1104.

OCTOBER TERM, 1888.

CITY OF NEW ORLEANS, PLAINTIFF IN ERROR

versus

LOUISIANA CONSTRUCTION COMPANY [LIMITED], ET. AL.

Now comes the Louisiana Construction Company [limited], defendant in error, in the above entitled cause, through its undersigned attorney, and moves the court to dismiss the writ of error sued out in this cause; and in case said motion is refused, then the defendant in error moves to affirm the judgment of the Circuit Court.

The ground of the motion to dismiss is as follows: This court has no jurisdiction to hear and determine this cause, for the reason that being a proceeding in equity, it has been improperly brought here by writ of error and not by appeal.

The following are the grounds for the motion to affirm:

This writ of error is manifestly sued out for delay.

The only two questions presented by the bills of exception of plaintiff in error were correctly answered in the instructions given by the court *a qua* in the affirmative. These questions being:

(1.) Has the city of New Orleans the power lawfully to withdraw any portion of the batture from public use, change its destination and make it private property?

(2.) If yea, did the city exercise this power and make the space in question private property by the execution of the lease for twenty-five years and the grant of possession under it?

The first of the aforesaid questions of law had been decided by this court, the Supreme Court of Louisiana and the Circuit Court of the United States for that Circuit, in accordance with the instructions complained of.

Board of Liquidation vs. Louisville & Nashville R. R. 109 U. S. 221.

New Orleans vs. Morris, 3 Woods, 115.

Hart vs. City of New Orleans, 12 Fed. Rep. 292.

Packwood vs. Walden, 7 N. S. 91.

Mayor, et al. vs. Hopkins, 13 La. 326.

De Armas vs. New Orleans, 5 La. 132.

Handlin vs. Railroad Companies, Manning's Unreported Cases, p. 173.

The second question is answered by the terms of the ordinance leasing the property in controversy, and by the general prohibition of the civil law that public property cannot be leased to a private corporation for private gain.

Pothier Contrat de Louage, Part 1, Chap. 11, No. 15.

Duranton, Vol. 17, No. 20.

This motion will be submitted to the court under the rule on that subject.

E. HOWARD McCALEB,

Attorney for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1104.

CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

versus

THE LOUISIANA CONSTRUCTION COMPANY (LIMITED), ET AL.

Brief for Defendant in Error, on Motion to Dismiss or Affirm.

STATEMENT OF CASE.

The Louisiana Construction Company [limited], obtained a judgment in the Circuit Court against the city of New Orleans, for the sum of fifty thousand dollars; issued its writ of *fieri facias;* caused the marshal to seize and advertise for sale all the right, title and interest of the city of New Orleans in and to four certain squares of ground, on which are erected the sugar shed warehouses, her right to receive the rents, and her right of reversion in the buildings. Thereupon, the city of New Orleans filed her petition of intervention and third opposition, averring that the squares were "*locus publicus*, and the grounds and sheds were, "when seized, and long prior thereto, and are now, exclusively "devoted to public use, that is, to purposes of commerce," and, as such, are not seizable or alienable as against the city and public. The dedication of the property to public use is amplified by other averments unnecessary to recite here. The prayer is for a "writ of injunction," directed to the plaintiff and marshal, prohibiting them "from seizing and selling said grounds occupied by

"the sugar sheds, and said sheds and said rights of the city to "said sheds, or arising out of the ordinances of the city and its "contract with the New Orleans Sugar Shed Company; that said "injunction be made perpetual, and said plaintiff and marshal "be forever enjoined and prohibited from setting up any claim "or pretension based on said seizure; that said seizure be set "aside and annulled, decreed unlawful; that said grounds and "sheds be recognized and decreed to be *locus publicus*, incapable "of seizure and sale; that the right of the city to hold and ad- "minister the same for public uses be recognized and decreed; "that the seizure of said rights of the city be annulled and de- "creed unlawful; that the said marshal be condemned to deliver "and restore to the city said grounds and sheds unlawfully seized," etc. On this petition, the court directed that an order of prohibition be allowed and issued, on intervenor and third opponent giving bond in the sum of $16,000. The bond was not furnished, the marshal proceeded with the seizure, advertisement and sale, at which the property was adjudicated to Isidore Newman for $50,000. The city then filed an amended and supplemental third opposition, making the purchaser a party, and prayed for the nullity of the sale; "that the ground be decreed to be *locus publi-* "*cus*, and that the right of the city to hold and administer the "same for public uses be recognized, and said ground, sheds, and "rights aforesaid, be decreed incapable of seizure and sale." The marshal answered, disclaiming any personal liability, he having acted solely under instructions of plaintiff in execution. The New Orleans Construction Company filed the following exceptions and answer to the intervention and third opposition of the city:

"That opponent, the city of New Orleans, is estopped by her "conduct from asserting or contending that the property described "and referred to in said opposition, is part of the landing and "levee necessary for loading and unloading steamboats and other "vessels, or for commerce: because, by Act No. 90, approved

" March 30th, 1843, antitled 'An act to define the powers of the " 'corporation of the city of New Orleans,' and which act is still " in force, the General Assembly of the State of Louisiana de- " clared it was 'incompetent for the city of New Orleans to enact, " 'enforce or execute any law, ordinance or regulation, whereby " 'any tax, duty, impost or charge, of any nature whatsoever, " 'shall be imposed upon goods, produce, wares and merchandise, " 'of whatsoever kind or nature, landed in, or shipped from, the " 'the corporate limits of said city.' That, notwithstanding said " statute, and the prohibitions therein contained, said opponent " did, by ordinances dated August, 1869, No. 1528, N. S., and " May, 1878, No. 4492, A. S., authorize the Sugar Shed Company " to charge certain sums in said ordinances for the shelter and " storage of sugar and molasses, which charge could not be im- " posed for the use of said property, if the same were, as is falsely " averred, a part of the public landing. And, moreover, by Ar- " ticle 3, of ordinance 7079, A. S., enacted May, 1881, and section " 3, of ordinance 1386, enacted August, 1885, designating the " location of the wharves and levees, specially provided: 'That " 'the levee shall comprise the levees already existing in the " 'Second District, from Customhouse street to St. Louis street, " 'the street in front of the sugar sheds.' That having so located and " designated the wharves and levees, and the boundaries thereof, " by said ordinance, said city is estopped from asserting that the " location and boundaries are different and greater than those enu- " merated and fixed in said ordinances, and cannot now extend " the same, so as to include the property and squares on which said " sugar sheds are situated; all which matters and things this de- " fendant doth aver to be true, and pleads said ordinances as an " estoppel in bar to the said original and supplemental petitions " of intervention and third opposition herein filed."

And for answer, the Louisiana Construction Company [limited], avers and says: "That it denies, generally, all and singular the " allegations in said petition of intervention and third oppo-

"sition contained. That, true it is, this defendant caused the "clerk of this court to issue the writ of *fieri facias* upon the judg- "ment rendered in this suit, after vainly endeavoring to other- "wise obtain satisfaction of said judgment, and ordered and di- "rected R. B. Pleasants, United States marshal, to seize, advertise "and sell, according to law, the property described in opponent's "petition, to pay and satisfy said judgment, interest and costs. "That at said sale said property was adjudicated by said marshal "to Isidore Newman, he being the highest and last bidder, for the "price and sum of fifty thousand dollars. That all of said prop- "erty seized, advertised for sale, and adjudicated to said Isidore "Newman by said marshal, under said writ of *fieri facias* in this "suit, was liable and subject to seizure and sale to pay the judg- "ment debt due and owing unto this appearer by the city of New "Orleans as afor said.

"The said five squares of ground and the right, title and in- "terest of the city of New Orleans of every kind and nature, the "sheds, structures, buildings, and improvements on said squares, "the option of the city to take said sheds and structures, the op- "tion of extending the use of said sheds and structures, and all "of the right, title and interest of the city of New Orleans, arising "under the contract with one F. B. Fleitas and the New Orleans "Sugar Shed Company, is in no way or manner public property, "in its character or nature, and has never been so treated or con- "sidered either by the State of Louisiana or by the city of New "Orleans in its acts and dealings regarding said property. That "said five squares of ground, on which said sugar sheds are sit- "uated, between Canal and Peters street, and the river, is allu- "vion or batture, which, within the last one hundred and twenty- "five years, has been formed in front of the original city of New "Orleans, and this alluvion has projected so far as to make the "batture much broader than was needed for the purposes of com- "merce, and that as said alluvion increased, the city of New Or- "leans from time to time divided said batture into squares and

"sold it to individuals or corporations for their private use, ben-
"efit and enjoyment. In this manner the property adjacent to
"and in the vicinity of said sugar sheds, and which formerly
"formed a part of the levee and public landing, is no longer used
"for said purposes of commerce as a levee or landing. That the
"New Orleans Sugar Shed Company, under its contract with the
"city of New Orleans, has the exclusive possession and control of
"said squares of ground. That under the present charter (Act
"No. 20, of 1882, Sec. 14), the city of New Orleans is authorized
"'to lay off and sell in lots or squares, so much of the batture
"from time to time as may not be required for public purposes,'
"and the same authority existed and was exercised by the city of
"New Orleans under her previous charters. That said five
"squares of ground on which said sugar shed warehouses are
"situated, constitute no part of the public landing upon the levee
"of the city of New Orleans. That on the contrary the sugar
"shed situated on the square nearest the levee, or landing, is dis-
"tant from the outer edge of the steamboat wharf, two hundred
"and eighty feet, four inches and four lines, measured from the
"corner of said sugar shed, on Customhouse street, and one hun-
"dred and twenty-eight feet and eight inches and four lines, meas-
"ured along the prolongation of Bienville street to the outer edge
"of the steamboat wharf, fartherest from the river, and the re-
"mainder of said squares are at a much greater distance from the
"wharf or landing upon which vessels discharge their cargoes.
"There is a street intervening between the sugar sheds nearest
"the wharf and the wharf itself, or public landing, and the city
"of New Orleans in locating her wharves and levees had fixed
"the same as bounded by 'the street in front of the sugar
"sheds.'

"That all the sugar and molasses received in the city of New
"Orleans by railway is landed and deposited at other places than
"at the wharf in front of said sugar sheds, and a large quantity of
"sugar and molasses landed on the levee in front of said sugar

"sheds by steamboats and other water-craft is rapidly removed "therefrom by wagons, drays and other vehicles to other ware- "houses than those erected by said New Orleans Sugar Shed "Company on the squares described in opponent's petition. By "ordinance of the city of New Orleans, no produce, etc., is al- "lowed to remain on the wharves or landings for a longer period "than forty-eight hours after being landed or discharged from "any vessel or water-craft.

"That the warehouses or sugar sheds erected on said squares "by said Sugar Shed Company are used exclusively for the profit "and gain of said company, and are not dedicated for public "purposes to a greater extent than any other warehouses in the "city of New Orleans. That sugar and molasses factors and "other receivers of sugar and molasses at this port, have often "complained and remonstrated with the officers and government "of the city of New Orleans against the charges and exactions "of the New Orleans Sugar Shed Company and the monopoly or "exclusive privilege attempted to be exercised by said Sugar "Shed Company, and of the discrimination made in favor of said "company by the city of New Orleans, but all to no purpose.

"That the city of New Orleans receives no benefit and de- "rives no gain whatever from the contract made with the Sugar "Shed Company. That as regards the ten per cent. gross receipts "agreed to be paid by the Sugar Shed Company for the portion "of the year of 1887, which was also seized by garnishment pro- "cess in this suit, the same does not constitute a part of the pub- "lic revenues of the city not liable to seizure, but on the contrary, "are seizable. The Sugar Shed Company has long since ceased "to pay, and the city of New Orleans does not now exact the ten "per cent. bonus stipulated in the contract, and the same is no "longer put upon the budget of revenues of said city. And, "finally, this defendant denies that any of the squares seized at "its instance aforesaid, are *loci publici* or *hors de commerce*, or in

"any way exempt from and not subject to seizure and sale. On "the contrary, it avers and charges and, so the fact is, that all of "said property is and was liable and subject to seizure and sale "to pay the judgment aforesaid, held and owned by this appearer "against the city of New Orleans. That none of said property "forms a part of the wharves or landings, nor is it in any way "necessary, for purposes of commerce, or in any manner dedi- "cated to public use. Wherefore this appearer prays that the "petition of intervention and third opposition herein filed be "dismissed and apponent's demand rejected with costs, and for "general relief."

Upon these issues the parties went to trial, and after hearing the evidence the jury returned a verdict against intervenor and opponent, judgment was entered up in accordance therewith, from which the city of New Orleans sued out this writ of error.

ARGUMENT ON MOTION TO DISMISS.

This suit being a proceeding in equity was improperly brought here by writ of error instead of by appeal. "Under the judiciary "act causes in equity cannot be removed by writ of error from "the Circuit Court for re-examination in the Supreme Court."

The San Pedro, 2 Wheaton, 132.

"In the Circuit Court of the United States for Louisiana, "where a party seeks relief which is mainly appropriate to chan- "cery jurisdiction, chancery practice must be followed. A writ "of error is not the appropriate mode of bringing up, for re- "view, a decree in chancery."

McCollum vs. Eager, 2 How. 61.

"The distinction between writs of error and appeals cannot "be overthrown by an agreement of counsel in the court below."

Minor vs. Tillotson, 2 How. 329.

Surgett vs. Lapice, 8 How. 48.

In Walker vs. Dreville (12 Wall. 440), this Court held that

notwithstanding the peculiarities of the Civil Code of Louisiana, the distinction between law and equity must be preserved; that the pleadings in the Circuit Court of that State, both at law and equity, being by petition and answer, the Court must look at the essential nature of the proceeding, to determine whether it belongs to the one or to the other; and that a suit in equity, by whatever name it may be called, when brought here by writ of error, must be dismissed.

This cause is essentially one of equitable jurisdiction. From the averments contained in the petition and supplemental petition of plaintiff in error, filed in the lower court, and especially the prayer for relief, it clearly appears that this suit involves three elements which are exclusively cognizable in a court of equity, viz.: trust, injunction and prevention of cloud upon title to real estate.

Trust. The property in question is claimed by the city as public—*locus publicus.* Revised Civil Code of Louisiana, Articles 454 and 458.

The city asserts title, not in herself, but in the public, for whom she claims to be administrator or trustee.

"The municipal corporation is administrator for the public."
Municipality No. 1 vs. Municipality No. 2, 12 La. 49.
Pulley vs. Municipality No. 2, 18 La. 278.

"It is recognized by many decisions that the city of New Or-
" leans has, by law, the administration of the *batture.*"
Remy vs. Municipality No. 2, 15 A. 657.

"It belongs to the local authority to enforce the *trust* and
" prevent what they shall deem a violation of it by the city au-
" thorities."
New Orleans vs. The United States, 10 Pet. 737.

A court of Chancery, as contradistinguished from a court of law, is the proper jurisdiction to protect trust property.

"A city may, by a suit in equity, restrain its execution cred-
"tors from selling property held by it in trust."

New Orleans vs. Morris, 105 U. S. 600.

Injunction. The Circuit Court sitting as a Court of Equity can restrain by injunction the seizure, by the marshal, under *fieri facias* on a judgment at law, of property not subject to levy and sale.

Gue vs. Tide Water Canal Co., 24 How. 257.

The Circuit Court can restrain, by injunction, the sale of a homestead exempt from execution under a *fieri facias* issued upon a judgment obtained at law.

Fink vs. O'Neil, 106 U. S. 272.

In Louisiana the writ has been frequently applied to protect the exempt property of the judgment debtor from execution.

Police Jury vs. Michel, 4 A. 84.
Police Jury vs. Foulhouze, 30 A. 64.
Prather vs. Bobo, Sheriff, 15 A. 524.

It has often been sanctioned as the proper remedy to prevent the sale of the homestead of defendant in execution.

Doughty vs. Sheriff, 27 A. 356.
Hargrove vs. Flournoy, 26 A. 646.
Robert vs. Coco, 25 A. 200.
White vs. Givens, 29 A. 571.
Tisné vs. Tanihill, Sheriff, 28 A. 793.

Cloud upon Title. The ground upon which Courts of Equity interfere for the protection of homesteads or other exempt property from sale on execution is to *prevent a cloud upon the title.* Therefore a Court of Equity will frequently enjoin the sale of property exempt from seizure and execution.

¶ ¶ 438 and 439 Freeman on Executions.
¶ 681 Thompson on Homesteads and Exemptions.

The plaintiff in error will probably rely upon the decision of this court in Van Norden vs. Morton, 99 U. S. 378, to sustain the writ of error in this suit, but the rulings in that case are not applicable to this, because 1st: That was an injunction sued out by a *third person* not originally a party to the cause claiming ownership of the property seized, and not the defendant in execution. Louisiana Code of Practice, Arts. 395 *et seq.*; 2d: The property seized and claimed in that case was personal, not real, and consequently it was not, and could not be affected, by any cloud upon the title; 3d: Nor was the dredge-boat seized, in that case, burdened with any trust in favor of third persons as is averred in this.

ON THE MOTION TO AFFIRM.

The following charge of the Judge *a quo* to the jury is complained of by defendants in error:

The jury are instructed as matters of law.

1st. "The spaces upon which the sugar sheds, the reversion "of the title to which has been seized, under a writ of *fieri facias*, "in this case, was prior to August 14th, 1869, upon the undis- "puted facts established a *locus publicus*."

2d. "That by the undisputed evidence it is established that "said space was a portion of what is called the "batture," "which is the alluvial land between that portion of the city of "New Orleans and the Mississippi river and was a *locus publicus* "at the time when Louisiana was acquired by the United "States.

"There is no doubt of the correctness of the general proposi- "tion, that a public place is inalienable except by the sovereign, "but a public place which is a portion of the *batture*, according to "the well settled jurisprudence of this State has a distinctive qual- "ity impressed upon it, and may be withdrawn from the use of the "public by the city. This qualification is seen to be a public "necessity when we consider that by the action of the vast stream

"which half encircles the city, the levees may be so widened as "that unless a portion of them were used for buildings, and the "inhabited city extended over them, the city itself would possibly "be left at an inconvenient distance from the river. Accordingly, "we find, both in the decisions of the highest tribunal in the State, "in the act of the legislature, a clear recognition of the authority "of the city to withdraw from the public use any portion of the "*batture* which it deems no longer necessary to be held for that "purpose.

"Therefore, the court instructs you that it was lawful for the "city of New Orleans to withdraw the said space from the pub- "lic and to make it private property, while it was a *locus publicus.* "The fee was in the city and the use was in the public, and the "question of fact for you to decide is, whether the city did not "by the contract or lease of the date of August 14th, 1869, with- "draw said space from the public use as being no longer neces- "sary for the public.

"It is to be observed that the said contract gives to the "grantee or lessee '*the exclusive right of using the public spaces,*' "and gives to him '*undisturbed possession of said public spaces and* "'*and the sheds thereon erected,*' said sheds are to be for the pur- "pose of storing sugar and molasses; there is no condition or re- "quirement in said grant or lease which requires the said grantee "or lessee to receive up to the capacity of the sheds, the sugar and "molasses of any person offering, or which prevents him from "any degree of discrimination *i. e.*, he may store the products of "one man and refuse those of another, although his store is not "full.

"The contract reserves a royalty as a rent. The possession "thus granted is to continue for the period of twenty-five years.

"The contract protected the public by the provision that '*the* "'*sheds should not be located more than one hundred and fifty feet to* "'*the present wooden work or wharves.*

"If you find this contract was executed by the city of New Or-
" leans, and was accepted by the grantee or lessee, and that he
" went into possession at the time of its execution, and ever since
" remained under it in possession, and there is no dispute about
" these facts, then the court instructs you there has been such a
" change in the destination of the property in question, such a
" withdrawal of it from the public, as makes it property held by
" the city for its own use, and not that of the public, and makes
" its reversion liable to seizure on the part of a creditor of the city
" of New Orleans, and your verdict would be for the plaintiff in
" the writ and against the intervenor and third opponent."

The judge, in allowing this bill of exceptions, states: "The
" question at issue, as appears by the pleadings, was, whether the
" space occupied by the sugar sheds, and the right to it, subject
" to the lease specified in the instructions given by the court to
" the jury, were liable to seizure and sale under a writ of *fieri*
" *facias*, sued out by a judgment creditor of the city of New Or-
" leans.

"The testimony given at the trial is correctly stated in this
" bill.

"The counsel for the intervenor and third opponent asked the
" court to give the instructions presented in the request, as stated
" in the bill. The court refused these instructions, in the manner
" and form as requested, except so far as embodied in those which
" were given, as stated in the bill.

"A bill of exceptions was taken to those given, and to the
" two propositions contained in the instructions given, as herein-
" after stated.

"The questions presented by the exceptions, are two:

1st. "Has the city of New Orleans the power, lawfully, to
" withdraw any portion of the batture from public use, change
" its destination, and make it private property?"

2d. "If yes, did the city exercise this power and make the "space in question private property, by the execution of the "lease for twenty-five years and the grant of possession under it?"

"Both these questions the Court in its instructions, answered "in the affirmative, and the bills of exception present those two "affirmative propositions so given as instructions to the jury.

"And since the matters herein stated do not appear by rec- "ord, this bill is allowed and signed."

The instructions given in the foregoing charge, objected to by plaintiff in error, are correct and proper upon the facts set forth in the bills of exception.

In Packwood vs. Walden, 7 N. S. 81, the Supreme Court of Louisiana reduced the issues to "two questions of law: 1st. By "the formation of the batture, did the place which it occupied "cease to be a part of the port of New Orleans? 2d. If so, after "the change did it still continue to be public property, unaliena- "ble and unalterable in its destination by any power, except that of "the State or of the United States? (Ib. pp. 84 and 85.) * * * "And here it may be said, without impropriety, that the state- "ment itself of the first proposition seems to involve an absurd- "ity. Land, according to any definition, can never be consid- "ered as making part of a port. A bank, quay or wharf is a "necessary appendage to it, and according to the jurisprudence "of this State is always public, and destined to the use of all, as "well as the port itself. But this public use cannot legally be "extended farther than the bank or wharf, which is always dis- "tinct from alluvion fully formed and subjected by law to the "ownership of private individuals or public bodies * * * "It is clear, from these definitions, that the place now occupied "by the alluvion * * although formerly a part of the port of "New Orleans, has long since ceased to be such. It is nearer to "the port than other squares of the city situated further from the

"river, but makes no more a part of it than they do. (Ib. pp. 88 and 89). * * * * *

"The second question is one of greater difficulty. Doubts may "be fairly entertained whether the change of the limits of the port "affected by alluvion and accretion, did not leave the land thus "raised public property in the most extensive sense of the terms, "subject to have it destination altered only by the supreme legis- "lative power of the State, or that of the United States. In or- "der to arrive at a correct decision relative to these doubts, we "are compelled to examine the doctrine of alluvion, so far as it "affects the rights of cities. * * * *

"According to this examination of the cause, it is readily seen "that if the city did really acquire the alluvion in question the "Mayor and Common Council had the power to lay it out into "squares and lots, to order streets to be made, etc., and to sell "the land, as they continue to do in relation to the commons in "the rear of the city.

"Having power to sell they could lawfully transact and com- "promise with other claimants of the same property; which has "been done as above stated, and by which a new bank or levee "has been made on the river, forming the quay or wharf of the "port, the use of which is public and common to all. The second "question must, therefore, be decided against the pretentions of "plaintiff on the batture as public property, and such as is *hors* "*de commerce*," (pp. 90, 91 and 92).

In De Armas vs. New Orleans, (5 La. 132), the Court say, "so "much of a quay as is necessary for loading or unloading vessels "is public, and not susceptible of private ownership, but the rest "may be private property."

In Mayor, et al. vs. Hopkins, (13 La. 326), it was held that "The State can authorize the city to sell public property such as "a quai." The questions at issue were carefully considered by the Circuit Court is the cases of Morris vs. New Orleans, (3 Woods,

115), and Hart vs. New Orleans, (12 Fed. Rep. 292.) In the latter case the identical squares of ground on which the sugar sheds are erected and the city's reversionary rights were held liable to seizure.

In the Board of Liquidation vs. L. & N. R. R. Co., (109 U. S. 221), this court sustained a compromise between the city authorities of New Orleand and a railroad company respecting a disputed grant of a user of a part of the city property known as the *batture*, as authorized by the laws of Louisiana.

Even if the city required authorization from the State to change the destination of her batture property from public to private, which under the decisions above referred to we conceive she did not, ample authority for such mutation can be found in the Act No. 333, approved April 30th, 1853, entitled "An act to "enable riparian proprietors in incorporated towns and cities to "recover batture which is not necessary for public uses;" Rev. Stats. of La., 1870, Sec. 318; also in the Charter of the city of New Orleans, (Act No. 20, of 1882, Section 7, [14] p. 21), authorizing the City Council "to lay off and sell in lots or squares, so "much of the *batture*, from time to time, as may not be required "for public purposes."

By leasing this property to the Sugar Shed Company it ceased to be public and became private in its character; for public things are not susceptible of being leased. Pothier says (Contrat de Louage, Part 1, Chap. 11, No. 15): "Les choses qui "sont *publici juris*, c'est-a-dire qui sont destinées aux usages "publics, comme les places publiques, les rues, les grands che- "mins, ne sont pas plus susceptibles du contrat de louage que du "contrat de vente."

Duranton (Tome 17, No. 20), announces the same doctrine: "Suivant l'article 1713, on peut louer toutes sortes de biens, meu- "bles ou immeubles, pourvu, bien entendu, que les choses soient "dans le commerce; car ce qui ne pourrait être vendu comme

" n'etant point dans le commerce, telle qu'une Eglise consacrée " au culte, un chemin public subsistant encore comme tel, ne sau- " rait non plus être la matière d'un louage."

The provisions of the ordinance leasing this property to Fleitas, or his assigns, are totally incompatible with the pretension that it is dedicated and used for public purposes. The first section gives to the lessee the exclusive right and privilege of using these public squares for the period of twenty-five years, for the purpose of constructing thereon fire proof sheds for the reception and shelter of sugar and molasses.

The second section provides for the erection of said sheds, with such accommodations for the transaction of business by the lessee at his own cost, and to keep them in good order and repair.

1. Fixes the charges for storage.

2. Requires payment of ten per cent. of gross amount of charges realized to the city, and exempts the sheds and revenues derived therefrom from municipal taxation.

4. Provides for appraisement of the sheds at the termination of the lease, and the option of the city to take them at one-half of their value, or of extending the privilege for fifteen years longer.

Section 3 guarantees to the lessee, or his assigns:

1. The undisturbed possession of the spaces and sheds erected thereon.

2. That the sugar landing should remain in the same place.

3. That no other should be established; and,

4. That no other privilege for the reception and shelter of sugar and molasses should be granted by the city.

Section 4 provides for the erection of additional sheds. Section 5 requires bond and security of fifty thousand dollars from the lessees. Section 6 makes it the duty of the wharfinger to enforce existing regulations when the levee is encumbered. Section 7 enacts: "That the sheds shall *not be* located *nearer than one hun-*

"*dred and fifty feet to the present* woodwork or wharves." Section 8 reserves to the city the right of opening streets; and Section 9 contains the usual repealing clause.

The amendatory ordinance of May 8th, 1878, fixes the rate of charges for storage, and contains other provisions unnecessary to mention. The exclusive possession and occupancy of these public spaces by the lessee, is entirely irreconcilable with the idea of public things "which are for the common use of the city, as streets "and public squares." (Rev. C. C. Art. 454), and "which belong "in common to the inhabitants of cities," i. e., "common prop- "erty to the use of which all the inhabitants of a city * * * "and even strangers are entitled in common: such as the streets, "the public walks, the quays." R. C. C., Art. 458.

The seventh section of the ordinance granting this lease, shows that these sheds form no part of the wharves used for loading and unloading vessels, but are required to be constructed one hundred and fifty feet distant therefrom; they are, therefore, not public things by destination, but clearly susceptible of private ownership. (5 L. 132.)

Article 3, of ordinance 7079, Administration Series, enacted May 1, 1881, and section 3, of ordinance 1386, C. S., enacted by the City Council of New Orleans, August 1885, in designating the boundaries of the wharves and levees, specially provided: "*that* "*the levee shall comprise* the levees already existing in the Second "District of the city of New Orleans, extending from the river to "the line of streets fronting the river, that is to say, in the Second "District from Customhouse street to St. Louis street, the street "in front of the sugar sheds."

Here is a clear admission that these sugar sheds are separated from the levee by a street; and, consequently, form no part of the wharves and landings.

It is, therefore, clearly apparent from the laws of the State, the ordinances of the city of New Orleans, the decisions of the

courts, both State and Federal, that the spaces of ground in question are not *loci publici*, but the private property of the corporation, and as such subject to seizure and sale at the instance of the city's judgment creditors.

Street R. R. Co. vs. Hart, 114 U. S. 662.

We ask that the judgment be affirmed with costs.

Respectfully submitted,

E. HOWARD McCALEB,

Attorney for Defendant in Error.